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No. 613

In the Supreme Court of the United States

OCTOBER TERM, 1938

SOUTHERN PACIFIC COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (R. 22–29) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered June 6, 1938 (R. 29). A motion for a new trial was overruled November 14, 1938 (R. 30). The petition for a writ of certiorari was filed January 24, 1939 (R. 30). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Where a company having a through line of railway between two points which is subject to land-grant deductions, establishes an alternate through route by combining parts of the old land-grant line with new lieu lines constructed without land-grant aid, should the Government's land-grant deduction from the rate for through shipments be based upon the land-grant mileage in the original line, or, as petitioner contends, upon the land-grant mileage actually used in the new alternate route.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 13–16.

STATEMENT

The special findings of fact made by the court below (R. 5–22) may be summarized as follows:

In 1887, the petitioner completed a through line of railway between Portland, Oregon, and San Francisco, California, and established through rates over that line between those points (R. 16). The length of that line was 774.86 miles, of which 663.16 miles had been granted to the railroad under Acts of Congress and were subject to land grant deductions (R. 8–9).

In 1926, the petitioner completed the construction of the second of two cut-offs which constituted alternate or lieu lines between points on the original line (R. 13–15). As a result of the cut-offs, the

distance between Portland, Oregon, and San Francisco, California, was reduced to 725.03 miles, of which 258.13 miles was mileage in the original route, subject to land-grant deductions (R. 7).

The purpose of the construction of the cut-offs was the development of local traffic, and the completion of an alternate or lieu line over which traffic could be moved more economically (R. 13–15).

The petitioner thereupon organized two routes between Portland and San Francisco, the first of which, called the Siskiyou route, was the original line completed in 1887; and the second route, called the Cascade route, consisted of the cut-offs which were completed in 1926 and of part of the original line (R. 15). After the two routes were constructed, the petitioner issued instructions to route through shipments over the Cascade route for reasons of economy, and thereby 1,275,000 tons of south-bound and 250,000 tons of north-bound traffic were diverted yearly from the Siskiyou route (R. 16). The petitioner's scheduled train service included two manifest or through freight trains south-bound and one north-bound in addition to local service daily over the Cascade route. Over the Siskiyou route there was only one local freight train each way daily (R. 16).

From the date of the organization of the Cascade route until November 1931, the rates over the two routes were identical (R. 20). Effective November 11, 1931, the petitioner, with the permission of the

Interstate Commerce Commission, revised the through rates between Portland and San Francisco (R. 19). For shipments between those points, the through rates charged private parties over the Cascade route were lower than those for the Siskiyou route on approximately 25 per cent of the freight traffic transported by petitioner (R. 11, 20–21).

Prior to the rate revision of November 11, 1931, the petitioner gave written notice to the Coordinator of Traffic of the Federal Traffic Board of the respondent, who was in charge of routing Government freight, that it proposed to apply the new rates to Government shipments, and advised the Coordinator that the Government might use either the Siskiyou or the Cascade route, and that the Government's routing with respect to either line would be followed[1] (R. 20).

In December 1931 and January 1932 the petitioner transported numerous shipments on Government bills of lading between Portland and San Francisco. Those shipments were unrouted by the

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[1] The petitioner contended that while the Goverment was entitled to a deduction of 42.792 per cent of the traffic rate over the Siskiyou route, based upon the proportion of line subject to land-grant deductions, as compared with the total length of the haul, it was entitled to a deduction of only 17.801 per cent from the rates for the Cascade route, on the ground that the deduction should be determined solely with respect to the new route, and be based upon the proportionate mileage subject to land-grant deductions as compared with the total length of the haul in the new route.

respondent[2] (R. 6). The petitioner assessed charges for the shipments based upon the lowest tariff rate applicable to the Cascade route less a land-grant deduction of 17.801 per cent. The respondent's accounting officers, on the other hand, made payments to the petitioner by deducting from the tariff rate on the Cascade route the land-grant deduction of 42.792 per cent, which was the land-grant deduction employed in the original line between Portland and San Francisco (R. 12).[3]

On April 4, 1933, the petitioner filed suit in the Court of Claims asking judgment for the difference between the sums paid under the various settlements of the accounting officers and the amounts claimed by it in its various bills (R. 1–4). The court below held that the petitioner was not entitled to recover, and dismissed the petition (R. 29). Thereafter a motion for new trial was overruled (R. 30).

ARGUMENT

The petitioner appears to urge two errors in the judgment of the court below: (1) That the court misconstrued the statutes determining its land-

[2] As a matter of fact, the petitioner transported those shipments over a third combination of its lines for which no through tariffs were published (R. 21), and which included more land-grant mileage than the Cascade route, amounting to 24.182 per cent of the total haul (R. 10).

[3] There were also shipments between East Portland and San Francisco (R. 6), with respect to which the Government claimed a deduction of 42.831 per cent, and the petitioner conceded a deduction of only 17.819 per cent.

grant deduction obligation; and (2) that the judgment is not supported by the special findings, but only by the opinion of the court below which relies in part on facts outside of or in conflict with the special findings.

1. The United States is required to pay for transportation of its property over petitioner's land-grant lines only 50 per cent of the charge for like transportation performed for the public at large.[4] The Government, through its officers, directed and required the petitioner to transport through shipments between San Francisco, California, and Portland, Oregon. The question is as to the proportion of the 50 per cent deduction available to the United States on through shipments moving over this through railway route originally subject to land-grant deductions and now composed in part

[4] The Act of July 25, 1866, *infra*, p. 13, provided that the property of the United States should be transported free of charge between Roseville, California, and East Portland, Oregon, when required by the Government of the United States. However, the Act of May 13, 1928, *infra*, p. 14, in order to remove the discrimination between petitioner and other land-grant railroads which were paid on Government traffic 50 per cent of the published tariff rates, provided that the railroad between East Portland and Roseville should receive compensation for transportation of property of the United States at the same rate as is paid other land-grant railroads. See Senate Rep. No. 698, 70th Cong., 1st Sess., p. 1. The Act of June 7, 1924, *infra*, p. 15, with respect to land-grant railroads, provided that they should be paid, for the transportation of United States property, at rates not exceeding 50 per cent of the rates for like transportation performed for the public at large.

of new lines not so subject. Petitioner contends that the Government is entitled to a proportion of its 50 per cent deduction based on the ratio of aided mileage *actually and presently employed* in the through rate to the total mileage thereof. The Government submits that this proportion should be based on the ratio of aided to total mileage *in the original line* between these termini.

This latter method of settlement has been followed by the respondent's accounting officers since April 17, 1888, when it was held that:

> If a railroad have a line between two points aided in whole or in part, and subsequently acquire a new line or lines, nonaided, between those same points, the accounts for Government transportation, when performed over the new line or lines, shall be stated in the same proportion of aided to nonaided miles as though the transportation were over the original line. (3 Dig. Dec. 2d Comp. 299.)

In conformity with the foregoing decision this method of settlement has been followed by the accounting officers of the Treasury Department and the General Accounting Office in numerous reported decisions involving the same or similar questions. 4 Dig. Dec. 2d Comp. 99 (No. 283) (1894); 5 Comp. Dec. 364 (1899); 17 Comp. Dec. 633 (1911); 21 Comp. Dec. 238 (1914); 24 Comp. Dec. 193 (1917); 3 Comp. Gen. 267 (1923); 10 Comp. Gen. 552 (1931); 15 Comp. Gen. 614 (1936). It may be noted that in one of the earliest rulings this prin-

ciple was applied with respect to the transportation of an employee of the Government by the Southern Pacific Co. from Sacramento to San Francisco via Benicia, the shortest and cheapest route, rather than via Stockton and over aided road. 5 Comp. Dec. 364, 365 (1899).

The method of settlement was specifically approved by the Circuit Court of Appeals for the Eighth Circuit in *United States* v. *Northern Pacific Ry. Co.* (1929), 30 F. (2d) 655, rehearing denied, 32 F. (2d) 698. There, as in the instant case, a railway constructed alternate lines to shorten its route and effect operating economies, and maintained only local service over the original land grant line, available at a higher rate (p. 660). The court held the railway could not, by subsequent construction of cut-offs and withdrawal of through service, deprive the United States of its right to deductions from the through rate on the basis of the land grant ratio established when the railroad was first constructed.

The decisions of this Court support the view that the privilege of the Government with respect to the transportation between stations on land-grant lines is not diminished by the utilization of cut-offs on the route. Thus in *Chicago, St. Paul, etc., Ry. Co.* v. *United States*, 217 U. S. 180, 188, although the statute did not in terms require the railway to build more than a single track, it was held that the Government's right to service was co-extensive with the road as constituted under the grant, and at-

tached to additional tracks used between the terminals. The land grant act constitutes a contract (*Burke* v. *Southern Pacific R. R. Co.*, 234 U. S. 669, 679; *United States* v. *Northern Pacific Ry. Co.*, 256 U. S. 51, 64) under which part of the railway's compensation has been paid in advance in land and the balance in money. *Louisville & Nashville R. R. Co.* v. *United States*, 267 U. S. 395, 402. In its turn, the United States is entitled to service equal to that enjoyed by the public at stated lower rates. *Southern Pacific Co.* v. *United States*, 237 U. S. 202; *Louisville & Nashville R. R. Co.* v. *United States, supra; Louisville & Nashville R. R. Co.* v. *United States*, 273 U. S. 321.

The higher through rate on the Siskiyou route—on which, indeed, there is no through freight service, but only local service (R. 16)—is an artificial concept amounting indirectly to a special tariff applicable to Government shipments (compare *Southern Pacific Co.* v. *United States*, 272 U. S. 445), and can not affect the advantage over private shippers for which the Government paid consideration in grants of land. Compare *Southern Pacific Co.* v. *United States, supra*, 237 U. S. 202, where the Court rejected the railway's contention that because of the Government's increased advantage from Roseville Junction to Portland, the lowest through rate between San Francisco and Portland could not be proportionately applied by the Government, instead of local rates, to the non-aided stretch between San Francisco and Roseville.

2. There is no merit to any of petitioner's contentions with respect to the insufficiency of the findings of fact. Obviously, the court below was justified in looking to the published administrative practice for aid in the construction of the laws, and without making specific findings of fact of the existence of such a practice. Compare *Minnesota* v. *United States*, No. 73, this Term, decided January 3, 1939. Likewise, it was entitled to refer to the *ratio decidendi* of the opinion in *United States* v. *Northern Pacific Ry. Co.*, 30 F. (2d) 655. The reference to the acquiescence by the railroads (R. 27) is not vitiated, as petitioner suggests (Pet. Br. 15) by the fact that in new situations the railroads protested the application of the prior rulings, so that new rulings were evoked. And the railroads certainly acquiesced in the rulings in the sense that no litigation was ever instituted by any of them, save for the Northern Pacific Ry. Co., which admitted the prior acquiescence, and the present petitioner.

Petitioner objects to certain statements as inconsistent with the findings. The statement that the rates over the Siskiyou route were excessive (R. 29) was not intended to suggest that they were unlawfully high, but merely that they exceeded the rates on the Cascade route and would prompt shippers to use the latter.

Objection is also made (Pet. 12) to the statement in the opinion below (R. 25) that petitioner secured authority to increase the existing rates

over the Siskiyou route and to reduce the rates over the Cascade route. In the first place the statement is wholly immaterial, since the Government's right to take the original proportion of deductions after using the route as determined by the cut-offs is not affected by the reason for the use of such route, whether for purposes of service or rate, or by the consideration whether the railway was compelled or merely permitted to increase the rate on the original route. Whenever a railroad has a new line between two points on aided road, the case is one for the application of the principle referred to (pp. 7–9), as stated in the accounting rulings (see especially 17 Comp. Dec. 633), in the *Northern Pacific* opinion, and in the opinion below. But in any event the findings of fact below (R. 16–20) neither contradict the statement in the opinion, nor support petitioner's suggestion that the disparity in rates between the two routes was compelled by law (Pet. 5, 12). They show that from September 1, 1926, to November 10, 1931, the port-to-port rates were the same over both routes (R. 20), and that petitioner continued to seek a lower through rate (R. 18). In its report of July 1930, the Interstate Commerce Commission revoked all existing Fourth Section orders, but it established a new order giving relief from the long-and-short-haul provisions between San Francisco and Portland. 165 I. C. C. 373. The order, specifying a minimum clearance over the water rates and minimum earnings per ton-mile and per car-

mile, did not assert that the rates authorized were confined to the Cascade route. Petitioner revised its rate structure effective November 11, 1931, and increased the port-to-port rates over the Siskiyou route (R. 20), but while the order permitted petitioner to file these rates, petitioner points to nothing to show that the order compelled the differential established by petitioner.

CONCLUSION

The decision of the court below was correct, and there exists no conflict of decisions. We respectfully submit that the petition for a writ of certiorari should be denied.

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FEBRUARY 1939.

APPENDIX

Act of July 1, 1862, c. 120, 12 Stat. 489, 493, providing for the construction of petitioner's line from San Francisco to Roseville, California:

> SEC. 6. *And be it further enacted,* That the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit despatches over said telegraph line, and transport mails, troops, and munitions of war, supplies, and public stores upon said railroad for the government, whenever required to do so by any department thereof, and that the government shall at all times have the preference in the use of the same for all the purposes aforesaid, (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service;) * * *.

Act of July 25, 1866, c. 242, 14 Stat. 239, 240–241, providing for the construction of petitioner's line from Roseville, California, to East Portland, Oregon:

> SEC. 5. *And be it further enacted,* That the grants aforesaid are made upon the condition that the said companies shall keep said railroad and telegraph in repair and use, and shall at all times transport the mails upon said railroad, and transmit despatches by said telegraph line for the government of the United States, when required so to do by

any department thereof, and that the government shall at all times have the preference in the use of said railroad and telegraph therefor at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service. And said railroad shall be and remain a public highway for the use of the government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the government of the United States.

Act of May 23, 1928, c. 720, 45 Stat. 722–723, enacted:

That the land-grant railroad heretofore operated, and now being operated, between the station formerly known as East Portland, in the State of Oregon, and Roseville, in the State of California, shall hereafter receive compensation for transportation of property and troops of the United States at the same rate as is paid to land-grant railroads organized under the Land Grant Act of March 3, 1863, and the Act of July 27, 1866 (chapter 278): *Provided*, That the Congress hereby reserves the right at any time by law to prescribe such charges as it deems advisable for such Government transportation.

Act of March 3, 1863, c. 98, 12 Stat. 772, 773:

SEC. 3. *And be it further enacted*, That the said lands hereby granted to said State shall be subject to the disposal of the legislature thereof, for the purposes aforesaid, and no other; and the said railroads and

branches shall be and remain public highways, for the use of the Government of the United States, free from all toll or other charge upon the transportation of any property or troops of the United States.

Act of July 27, 1866, c. 278, 14 Stat. 292, 295, and 297:

SEC. 5. * * * *Provided,* That the said company shall not charge the government higher rates than they do individuals for like transportation * * * service.

* * * * *

SEC. 11. *And be it further enacted,* That said Atlantic and Pacific Railroad, or any part thereof, shall be a post route and military road, subject to the use of the United States for postal, military, naval, and all other government service, and also subject to such regulations as Congress may impose restricting the charges for such government transportation.

Act of June 7, 1924, c. 291, Title I, 43 Stat. 477, 486 (U. S. C., Title 10, Sec. 1375), providing for payment to land-grant railroads for transporting property of the United States:

* * * *Provided,* That hereafter payment shall be made at such rates as the Secretary of War shall deem just and reasonable and shall not exceed 50 per centum of the full amount of compensation, computed on the basis of the tariff or lower special rates for like transportation performed for the public at large, for the transportation of property or troops of the United States over any railroad which under land-grant Acts was aided in its construction by a grant of land on condition that said railroad shall be and remain a public highway for the use of

the United States, and for which adjustment of compensation is required in accordance with decisions of the Supreme Court construing such land-grant Acts, or over any railroad which was aided in its construction by a grant of land on condition that such railroad should be a post route and military road, subject to such regulations as Congress may impose restricting the charge for such Government transportation, and such payment shall be accepted as in full for all demands for such service. * * *